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CHARLES ELMORE

Supreme Court of the United States

No. 18, Original

OCTOBER TERM 1932.

STATE OF OHIO,

Plaintiff,

vs.

THE CHATTANOOGA BOILER AND TANK COMPANY, A TENNESSEE CORPORATION, CHATTANOOGA, TENNESSEE,

Defendant.

Original at Law.

BRIEF ON BEHALF OF PLAINTIFF THE STATE OF OHIO.

JOHN W. BRICKER,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
State House Annex, Columbus, Ohio,
Counsel for Plaintiff.

TOOTHAKER & RODENFELD, Law Printers, Columbus, Ohio.

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IN THE

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THE CHATTANOOGA BOILER AND TANK COMPANY, A TENNESSEE CORPORATION, CHATTANOOGA, TENNESSEE,

Defendant.

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BRIEF ON BEHALF OF PLAINTIFF THE STATE OF OHIO.

STATEMENT OF FACTS.

The defendant is a corporation organized under the laws of the state of Tennessee and is engaged in that

state in the construction and manufacture of boilers and tanks. When, however, such products are sold by the defendant to purchasers in other states, the installation and erection of them is necessary in such other states. The defendant corporation has never had an office or place of business in the state of Ohio.

Some time in 1928, the defendant sold to the Ironton By-Products Coke Company, an Ohio corporation located in the city of Ironton, Ohio, certain tanks manufactured by the defendant in the state of Tennessee and the defendant was required under the contract of sale to install and erect said tanks in Ironton, Ohio. The work in Ohio, required in the installation and erection of the boilers and tanks sold by the defendant, began on April 9, 1928, and was completed on May 11, 1928. When the defendant began the work in the state of Ohio, it brought four employes, citizens and residents of the state of Tennessee, to perform the work for the defendant in the erection and installation of the tanks in Ohio. The defendant, in the process of fulfilling that work, hired four additional employes in the city of Ironton, all of whom were citizens and residents of the state of Ohio.

While engaged in erecting and installing one of the tanks in Ironton, Ohio, William R. Tidwell on May 5, 1928, fell from the top of the tank sustaining a fracture at the base of the skull and as a direct and proximate result of this injury died the following day.

William R. Tidwell, the deceased, was for some time prior to his death one of the regular employes of the defendant, having entered employment in the state of

Tennessee. The deceased was particularly employed as a rivet heater in the installation work done by the defendant.

The defendant, on May 5, 1928, the day of the fatal injury to Mr. Tidwell, had in its employ within the state of Ohio three or more workmen regularly employed in its business. The Chattanooga Boiler and Tank Company did not comply with the provisions of the workmen's compensation act of Ohio either by becoming a subscriber to the state insurance fund or by electing to pay compensation direct to injured employes or their dependents in case of death. The defendant did, however, comply with the workmen's compensation act of the state of Tennessee.

Following the death of William R. Tidwell, his widow Mrs. Cora Tidwell, a citizen and resident of the state of Georgia, filed an application with the Industrial Commission of Ohio for death benefits on account of the death of her husband and in accordance with the provisions of the workmen's compensation act of the state of Ohio. Subsequently, the Industrial Commission, after notice to the defendant, considered the application and found and determined that the said widow is entitled to an award under the Ohio law as a total dependent on her deceased husband, and granted an award in the sum of $4800.64 together with a sum of $110.00 for medical and funeral expenses.

The commission further found that the defendant was an employer within the meaning of the workmen's compensation law of Ohio and therefore ordered the defend-

ant to pay the above award into the state insurance fund of Ohio, which the defendant has failed and refused to do. (The above facts are stipulated and agreed. See Appendix B in the petition.)

THE PROBLEM IN THE CASE.

The problem in this case under the agreed statement of facts relates to the jurisdiction of the Industrial Commission of Ohio in making the award in favor of the widow and whether at the time of the fatal injury to William R. Tidwell the defendant company was amenable to the Ohio workmen's compensation law and therefore liable for the payment of the award.

OUTLINE OF ARGUMENT.

I.

The Ohio workmen's compensation law is a valid exercise of the police power and is of the compulsory type.

II.

Under the Ohio act, a status is created regulating the employer and the employe within the territorial jurisdiction.

III.

The defendant was doing business in Ohio at the time of the fatal injury and was amenable to the Ohio law.

IV.

In the absence of federal regulation over the subject matter, the Ohio act is applicable even in interstate employment.

V.

No conflict of laws exists since Ohio, the state of injury, granted compensation under its distinctly compul sory system.

VI.

The widow's claim was denied by the Supreme Court of Tennessee solely by reason of Ohio taking jurisdiction.

VII.

The Tennessee act is optional or elective creating a contractual relationship but is not exclusive as to remedy in proceedings outside of that state.

VIII.

The petitioner is entitled to equitable contribution from the defendant, the award having been paid in full out of the state insurance fund of Ohio.

THE ARGUMENT.

I.

THE OHIO WORKMEN'S COMPENSATION LAW IS A VALID EXERCISE OF THE POLICE POWER AND IS OF THE COMPULSORY TYPE.

The present Ohio workmen's compensation law was enacted in pursuance of Article II, Section 35, of the Ohio Constitution which reads in part as follows:

> "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease."

This act is embodied in the General Code of Ohio under Sections 1465-37 to 1465-112, inclusive.

It will be noted that Ohio's act is compulsory as distinguished from the elective or optional type of compensation law. It rests upon the police power of the state to regulate the status of the employer and employe and

the relationship of employment within the boundaries of Ohio. The Supreme Court of Ohio upheld its constitutionality as a valid exercise of the police power. It does not use public funds for private purposes; it does not take private property without due process of law; it does not deprive parties of the freedom of contract; it does not make an unjust classification and it does not invest the Industrial Commission with a judicial power. State v. Creamer, 85 O. S., 349.

The constitutionality of the act was also upheld by this court in a case which came up from Ohio, as a proper exercise of the police power of the state. Jeffry Mfg. Co. v. Blagg, 235 U. S., 571. Similar acts enacted under the police powers of the state have been upheld by this court in the following cases: N. Y. Central Ry. v. White, 243 U. S., 188 (N. Y.); Mt. Timber Co. v. Washington, 243 U. S., 219 (Wash.); 250 U. S., 400 (Ariz.).

The particular section of the General Code upon which the award was made in the instant case is 1465-74 of the General Code of Ohio. This section, insofar as it is applicable to this case, reads in part as follows:

> "Any employe whose employer has failed to comply with the provisions of Section 1465-69, who has been injured or has suffered an occupational disease in the course of his employment, and which was not purposely self-inflicted, or his dependents in case death has ensued, may, in lieu of proceedings against his employer by civil action in the courts, as provided in Section 1465-73, file his application with the commission for compensation and the commission shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such

claimant as he would be entitled to receive if such employer had complied with the provisions of Section 1465-69, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the Industrial Commission a bond, in such an amount and with such sureties as the commission may require, to pay such employe such award in the manner and amount fixed thereby. In the event of the failure, neglect or refusal of the employer to pay such compensation to the person entitled thereto, or to furnish such bond, within a period of ten days after notification of such award, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed by the commission, and the commission shall certify the same to the attorney general who shall forthwith institute a civil action against such employer in the name of the state, for the collection of such award. In such action it shall be sufficient for plaintiff to set forth a copy of the record of proceedings of the commission relative to such claims as certified by the commission to the attorney general and to state that there is due to plaintiff on account of such finding and award of the commission a specified sum which plaintiff claims with interest. * * * The payment of any judgment recovered in the manner provided herein shall entitle such claimant to the compensation provided by this act for such injury, occupational disease or death. The attorney general shall, as soon as the circumstances warrant, and not more than two years after the date of such award made by the commission, certify to the commission the result of his efforts to recoup the state insurance fund as herein provided, and if he certifies that such award cannot be collected in whole, the award shall be paid from the surplus created by Section 1465-54, and any sum then or thereafter recovered on account of such award shall be paid to the commission and credited to such fund as the commission may

designate. (As amended 111 O. L., 222. Effective July 14, 1925. This is Section 27 of the act.)"

The above section was interpreted in the case of Fassig v. State, ex rel., 95 O. S., 232, holding a non-complying employer liable for an award made by the Industrial Commission, wherein the court added "the provisions of Section 27 (1465-74 G. C.), of the workmen's compensation act constituted a valid exercise of the legislative power not repugnant to the federal or Ohio Constitution nor to any legislation contained in either."

The United States Supreme Court in the N. Y. Central Ry. v. Sarah White case, supra, was called upon to construe the validity of an award made in New York under the workmen's compensation law of New York. In upholding the compulsory system of insurance, the court stated:

> "and we recognize that the legislation under review does measurably limit the freedom of the employer and an employe to agree respecting the terms of employment and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state."

The state of Arizona, like Ohio, has a compulsory workmen's compensation law as to the rights and obligations of employer and employe. The Supreme Court of that state in the case of Ocean Accident & Guar. Corp. v. Indus. Comm. of Ariz., 257 Pac., 644, in construing the Arizona act, said:

> "This act, so far as the employer is concerned is compulsory in its nature. He has no option as to

> whether he will accept or reject it and the whole language, both of the constitutional amendment authorizing it and of the act itself, clearly shows that they were passed not on the old theory of contract of parties but upon the inherent rights of the state recognized by the Supreme Court of the United States by virtue of its police power to establish certain rules regulating the status of employer and employe."

In the Arizona case above, it is to be noted that the injured employe was hired in the state of California but the injury occurred in Arizona. The payment of compensation in Arizona was upheld by the Supreme Court of that state regardless of the provisions of the California act.

A reading of the Ohio constitutional provision creating a compulsory state insurance fund, together with the decisions interpreting the Ohio act and similar acts indicate that the compulsory type of workmen's compensation act is distinctly different from the optional or elective type.

II.

UNDER THE OHIO ACT, A STATUS IS CREATED REGULATING THE EMPLOYER AND THE EMPLOYE WITHIN THE TERRITORIAL JURISDICTION.

Since the Ohio act is compulsory, a status is created which affects the relationship between the employer and the employe within the territorial limits of the state.

with no distinction on the basis of citizenship or legal residence of the parties involved in that relationship. Section 1465-60, General Code of Ohio, defines who is an employer.

> "* * * **Every person, firm and private corporation,** including any public service corporation, that has in service three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written." (Boldface ours.)

Section 1465-61, General Code of Ohio, defines who is an employe.

> "* * * **Every person in the service of any person, firm or private corporation,** including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer. * * *"

The language in the above two sections does not in any manner suggest any limitation as to the citizenship or legal residence of the employer and employe.

In Smith v. Heine Safety Boiler Co., 119 Me., 552, the Industrial Accident Commission of Maine was held to have jurisdiction to hear the claim of the widow of an employe who was accidentally killed while working in that state although the employer was a foreign corporation and the decedent was not a resident of Maine and the contract of employment was made in a third state.

The compulsory type of workmen's compensation law which creates a status for the parties precludes the idea of a contractual relationship inconsistent with the policy of the state.

The United States Supreme Court in Cudahy Packing Co. v. Paramore, 263 U. S., 418, Mr. Justice Southerland at page 243 stated:

> "Workmen's compensation legislation rests upon the idea of status and not upon that of implied contract."

The Paramore case was cited with approval in Bountiful Brick Co. v. Giles, 276 U. S., 154.

The employer cannot lessen his obligations and the employe cannot waive his rights under the statute by agreement. Such agreements have been held void as against public policy in addition to being prohibited under the act. Section 1465-94, General Code of Ohio.

A proceeding for compensation under the New Jersey Act was held to be neither an action in contract nor in tort but really a proceeding to enforce a statutory duty. Barr v. Court of Common Pleas, 88 N. J. L., 128.

If the defendant had complied with the Ohio act, such an act would have been included in the contract of employment which was entered into between employer and the employe in the instant case in Tennessee, however, by reason of the failure of the employer to comply with the Ohio act, the law super-imposes the Ohio provisions and makes them part of the Tennessee contract.

In Gooding v. Ott, 77 W. Va., 487, the Supreme Court of Appeals said:

> "Where the statute compels submission by the employer and employe, there is no contract, as a general rule enforceable outside of the state."

In Carl Hagenbeck, et al. v. Randall, Ind. App., 126, N. E. 501, an Indiana corporation was held liable to pay compensation under the act for injury to an employe in Indiana. The Industrial Board, not lacking jurisdiction by reason of the contract of employment, which was entered into in Ohio, the court concluded that the employer could not relieve itself of a statutory obligation by a foreign contract, its obligation under the Indiana compensation act being super-imposed upon the Ohio contract as a condition of performance in Indiana.

The Supreme Court of Ohio, reasoning along the same lines as the Indiana court in the case above, held in Thornton v. Duffy, 99 O. S., 120,

> "Contracts of indemnity between employers and an insurance company are subject to the power of the Legislature to impose conditions upon the employers. The state's power to act cannot be hampered by previous contracts."

It is also to be noted that by reason of the Tennessee act being optional or elective in its nature, it could not be given effect in Ohio where a different system of compensation prevails. By virtue of the status created under the Ohio act operating equally upon all persons, the defendant by employing men in Ohio for whom compensation may be provided by Ohio legislation, owed a

definite obligation to the state insurance fund and this duty or obligation on the part of the employer to the state of Ohio cannot be denied or hampered by the legislation of any other state. Neither is the inconvenience to the employer an element to be considered in this question for many employers engaged in nation-wide business may be required to comply with the workmen's compensation laws of every state in the union.

It is therefore respectfully submitted that the Industrial Commission of Ohio had the power to adjudicate the rights of the widow of the decedent and to make the award for death benefits under the Ohio law.

III.

THE DEFENDANT WAS DOING BUSINESS IN OHIO AT THE TIME OF THE FATAL INJURY AND WAS AMENABLE TO THE OHIO LAW.

The agreed statement of facts shows that the work in Ohio by this defendant constituted the erection and installation of tanks and that it was necessary, in addition to the four employes sent from Tennessee, to hire four additional employes in Ohio. The work of installing and erecting these tanks and boilers required ordinary labor and consumed a period of time from April 9, 1928, up to and including May 11, 1928. These eight employes were admittedly engaged in the regular business of this defendant and at the time of the fatal injury to William R. Tidwell, were engaged in the defendant's business in Ohio.

Section 5508 of the General Code of Ohio provides:

> "All foreign corporations, and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be, imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater power."

This court in the case of Browning v. The City of Waycross, 233 U. S., 16 (Ga.), held that a foreign corporation was doing business in Georgia because the affixing of lightning rods to houses was merely the doing of a local act after the interstate commerce had completely terminated, and it was not within the power of the parties by the form of their contract to convert what was exclusively a local business subject to state control, into an interstate commerce business protected by the commerce clause.

The Waycross case is a leading case on the subject of what constitutes the doing of local business within a state and the facts therein are particularly applicable to the instant case because it relates to the subject of installation. The test laid down by the United States Supreme Court in the Waycross case intimated that in order to preserve the character of an interstate commerce transaction, it is necessary that there be some intrinsic and peculiar quality or inherent complexity of the article in order to install or put it in place within the state. In our case, however, applying the test of the Waycross case, the article sold by the defendant was not of such inherent complexity and only required ordinary labor to install or erect the tanks in Ohio.

It is interesting to note that the Supreme Court of Tennessee interpreting what constitutes doing business, followed the test laid down in the Waycross case, and in Peck-Williams Heating & Vent. Co. v. McKnight & Merz, 140 Tenn., 563, held:

> "A foreign corporation which furnished and installed a heating and ventilating equipment in a theatre is 'doing business' in the state so as to require its qualification as a foreign corporation. It did not appear that the equipment furnished was of such a complicated nature that an expert from its factory had to be sent to install it. The company employed local workmen to do part of the work."
>
> See also Lummus Cotton Gin Co. v. Arnold, et al., 269 S. W., 706 (Tenn.).

Coming to the Ohio cases as to what constitutes "doing business", we find that the installation of three turbine engines is "doing business." Beech v. Kerr Turbine Co., 243 Fed., 706 (Ohio). The installation of machinery constitutes local business. Israel v. The Champion Shoe Mach. Co., 25 N. P. (n. s.), 507 (Ohio). Also, where a mechanic of a company is sent to inspect, test, and repair machines manufactured by the company, that constitutes "doing business in Ohio." Cone v. New Britain Mach Co., 20 Fed. (2d), 593 (Ohio). The Court of Appeals of Ohio in National Sign Corp. v. Maccar Cleveland Sales Corp., 33 O. App., 89, said the shipping of signs into Ohio is interstate transportation but arranging for locations, erection, and maintenance is intrastate service, performed in Ohio. The court further said:

> "Where the installation is not merely an incident of the sale but the principal part of the transaction

and the sale an incident, the transaction is no longer protected by the interstate commerce laws. This is especially true if the installation requires the employment of labor within the state, both skilled and unskilled."

Installation work has been held to constitute the doing of local business in the following cases:

U. S. Constr. Co. v. Hamilton Nat'l Bank, 126 N. E., 866 (Ind.);
B. F. Sturdevant Co. v. Adolph, etc., 196 Mich., 552;
A. H. Andrews Co. v. Colonial Theatre Co., 283 Fed., 471 (Mich.);
United Shoe Mach. Co. v. Ramlose, 210 Mo., 631;
W. B. Hays v. W. R. Robertson, et al. 271 Mo., 475;
Bryan v. S. F. Bowser Co., 209 S. W., 189 (Tax.);
Kinnear & Gages Mfg. Co. v. Miner, 89 Vt., 572.

The defendant having localized his regular business in Ohio subjected himself to all of the statutory rights and liabilities under the Ohio law and the subject of personal injury received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs. The trend of the development of the law historically considered has been toward the territorial law before which all are equal. In David v. New York & Northeastern Ry., 143 Mass., 301, the court stated "it must certainly be the right of each state to determine by its law under what circumstances an injury to the person will afford a cause of action."

Concluding this point, it is respectfully submitted that the defendant came into Ohio with four employes and in addition hired four Ohio employes, all of whom were en-

gaged in ordinary labor in the erection and the installation of the tanks at Ironton, Ohio, and that that work consumed a period of nearly six weeks. Under the test laid down by the Supreme Court of the United States in the Wayeross case and the interpretation of both the states of Ohio and Tennessee, this employer was doing business in the state of Ohio at the time of the fatal injury to William R. Tidwell and therefore the defendant became an employer within the meaning of the workmen's compensation act of Ohio and subject to all of the rights and liabilities provided therein.

IV.

IN THE ABSENCE OF FEDERAL REGULATION OVER THE SUBJECT MATTER, THE OHIO ACT IS APPLICABLE EVEN IN INTERSTATE EMPLOYMENT.

The above discussion definitely indicates that the defendant was doing business in the state of Ohio, however, assuming that the sale and the subsequent erection and installattion of the tanks was a transaction in interstate commerce, it is submitted that the Ohio act is nevertheless applicable in the absence of federal regulation.

There is no contention on the part of the defendant that the Congress of the United States has fixed any rule of liability or method of compensation for the employes engaged in the regular business of the Chattanooga Boiler & Tank Company.

The trend of the decisions, many of which emanated from this court, point to the conclusion that local compensation acts should control actions thereunder in preference to federal legislation. It seems clear that a state may, as long as it does nothing more than legitimately exercise its reserve police power, enact laws which will be valid although they may incidentally affect interstate commerce. Local laws covering the question of the relationship between the employer and the employe with respect to industrial accidents have their source in the powers which the state reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not within the meaning of the Constitution, or considered in their own nature regulations of interstate commerce.

In the case of Hendrick v. Maryland, 235 U. S. 610, the Supreme Court of the United States in the opinion delivered by Mr. Justice McReynolds says:

> "In the absence of national legislation covering the subject, a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles,—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines,—a practical measure of size, speed and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of health, safety, and comfort of their citizens; * * *."

In Austin v. Tennessee, 179 U. S. 343, at 349,, the court said:

> "We have had repeated occasion to hold, where state legislation has been attacked as violative * * * of the power of Congress over interstate commerce * * * that, if the action of the state Legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

The same rule is laid down in the case of Kelley v. Great Northern Ry. Co., 152 Fed. 211, which held that laws affecting the liability of common carriers for injuries to employes are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce, and that a state may, as long as Congress has not legislated on the particular subject, enact such laws in the exercise of its police power without invading the exclusive power of Congress.

If the contract of sale entered into between the Tennessee corporation and the Ironton By-Products Coke Company contemplated an interstate transaction, nevertheless the installation and erection of the tanks in Ohio over a period of six weeks, with eight employes half of whom were Ohio citizens and residents, constituted a termination of the interstate character so as to make the work in Ohio distinctly local in character. The parties could not by contractual relationship make a transaction one in interstate commerce when in fact it is on · involving local business.

Assuming that the sale of the tanks and boilers in its inception was a transaction in interstate commerce, the work at the moment of injury to the decedent was intrastate. The test which has been followed for a number of years has been laid down definitely and clearly by the United States Supreme Court in Shanks v. Delaware L. W. Ry. Co., 239 U. S. 556, where Justice Van Devanter used the following language:

> "The true test of employment in such commerce in the sense intended, is: Was the employer, at the time of the injury, engaged in interstate transportation or in work so closely related to it to be practically a part of it?"

In the year 1931-32, four important cases by this court indicated a clear tendency on the part of this court to place cases under local compensation acts in preference to the Federal act.

> Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74.
> Chicago & Eastern Ry. Co. v. Indus. Comm. of Ill., 284 U. S. 296.
> N. Y., N. H. & R. R. v. Bezue, 284 U. S. 415.
> Boston-Maine Ry. Co. v. Armburg, 285 U. S. 234.

In the Armburg case Mr. Justice Stone, after holding that the injury took place in local commerce under the Massachusetts act, in spite of the fact that the railroad did a large interstate business, stated:

> "The interstate commerce clause did not withdraw from the state the power to legislate with respect to their local concerns even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it."

Thus, it must be concluded that even though the defendant engaged in interstate commerce transactions in conducting its regular business, nevertheless, in matters involving injuries to employes of the defendant, the local workmen's compensation act would be applicable providing the interstate character of the transaction terminated.

V.

NO CONFLICT OF LAWS EXISTS SINCE OHIO, THE STATE OF INJURY, GRANTED COMPENSATION UNDER ITS DISTINCTLY COMPULSORY SYSTEM.

The Industrial Commission of Ohio, in considering its jurisdictional power to hear and determine the application for death benefits made by the widow of the decedent in this case, undoubtedly relied upon the facts that William R. Tidwell was injured in the state of Ohio while engaged in the course of his employment and that such employment was performed for the defendant, an employer who had in his employ three or more persons in Ohio on the date of the injury.

There is no denial that a great many cases have arisen involving a conflict of laws in the matter of taking jurisdiction under the workmen's compensation acts. In Ohio, however, under a distinctly compulsory system, every employer who has in his employ three or more persons, is required to contribute to a state insurance fund. Therefore, under the Ohio act, if the commission

found that the defendant was an employer doing business in the state of Ohio and that it had three or more people in its employment, then the commission would be compelled to take jurisdiction of the widow's claim and to make the award which it did make in this case.

Under a distinctly compulsory system which creates a state insurance fund made up by all the employers and paid out for the benefit of all the employes entitled thereto under the terms of the act, compliance with the law of Tennessee could not be a defense and deny jurisdiction of Ohio to make an award.

In the following cases, the workmen's compensation law of the state of hiring was considered not to apply to injuries occurring outside of that state.

North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1 (Cal.).
Union Bridge & Const. Co. v. Ind. Comm., 287 Ill., 296 (Ill.).
Bement Oil Corp. v. Cubison, 84 Ind. App., 22, (Ind.).
Cogliano v. Ferguson, 228 Mass. 147 (Mass.).
Keyes-Davis Co. v. Alderdyce, 3 N. C. C. A. 639 (Mich.).
Boggs v. Standard Oil Co., 180 N. Y. Supp. 560 (N. Y.).
Altman v. N. D. Work. Comp. Bureau, 50 N. D. 215 (N. D.).

The above principle seems to control the decisions under the workmen's compensation acts of England and Canada.

Tomalin v. S. Pearson & Son, 2 K. B. 61 (Eng.).
Schwartz v. India Rubber, 2 K. B. 299 (Eng.).
Vincent v. La Cre de Fer, Quebec 45, C. S. 353 (Canada).

Inconvenience has often been urged as an argument against applying the law of the state where the injury occurred. Such an argument, however, must be considered in the light of the hardship and evils which will result. The Supreme Court of Arizona, in the case of Ocean Accident & Guarantee Corp. v. Indus. Comm. of Ariz., 257 Pac. 644, commenting upon this type of argument said:

> "It is contended that this construction will mean that employers operating in many states must inform themselves as to the workmen's compensation act of each state into which they send their employes, and that this would impose an intolerable burden on them. Such a burden, however, is no greater than that which would be imposed upon the Industrial Commission and the courts of this state in attempting to enforce the compensation acts of the places where the contract of employment was made. And the hardship which might be small indeed, compared to the very possible evil which might result from the contract view of the law. * * * If we accept the construction placed by the petitioner upon the law, it will be entirely possible for large employers of labor to select a state where the benefits of the compensation law are extremely small, and by making their contract of employment in that state, reduce to a great extent the benefits which the public policy of this state has declared should accrue to the injured workman. We do not think a construction making such a thing possible is one which should be adopted unless it is unavoidable. The rule which we have laid down will make benefits for injuries of the same kind arising under the same circumstances uniform and certain, and insure that all persons holding the status of employe within this state will be insured the protection of its beneficient laws."

The Arizona decision is based upon similar facts in that it involved a conflict between the state of hiring, namely, California, which had the elective type of compensation and the state of injury which operated under the compulsory type of workmen's compensation. To the same effect, note also the following cases.

Smith v. Heine Safety Boiler Co., 112 Atl. 516.
Doughwright v. Champlin, 100 Atl. 97.
Davidheiser v. Hay Foundry Wks., 94 Atl. 309.
Johnson v. Nelson, 150 N. W. 620.

It is further submitted that there is nothing inherently unfair or unjust nor against public policy to permit payment both in the state of hiring and in the state of injury. Writers on the subject of workmen's compensation legislation have indicated that the payments provided thereunder are in the nature of insurance and invariably are inadequate compared to the actual loss and impairment of earnings or wages. For instance, nearly all acts permit, in addition to an action for compensation, either directly from the employer or out of the state insurance fund, that the injured employe or his dependents may proceed against a third party for negligence in causing such an injury or wrongful death. Thus, the employe or his dependents are given two separate rights growing out of an industrial injury.

Such legislation indicates that there is no legal reason nor any violation of public policy when the happening of a single event gives rise to two separate causes of action. In King v. Viscoloid Co., 219 Mass. 420, an injury to an employe who was a minor gave rise to a

right of compensation to him and a right at common law for damages by the mother of that employe.

In Roundsville v. Central Ry. Co., 87 N. J. L. 371, the court stated:

> "Recovery of compensation in two states is no more illegal and is not necessarily more unjust than recovery upon two policies of life insurance."

The Supreme Court of Texas, commenting upon the public policy as affected by double recovery, in Texas Employers Ins. Assn. v. Price, 300 S. W. 667, said:

> "We think that insurance taken by an employer for the benefit of his employes against injuries from accidents under the compensation law of New Mexico, in addition to insurance under the Texas compensation law of this state, and to collect on each, is not contrary to any policy of this state or interstate comity as suggested by the applicant."

Assuming, therefore, that the widow of William R. Tidwell had certain rights under the compensation act of Tennessee, there is nothing in law, reason, or public policy to prevent Ohio, under its compulsory system of insurance, to take jurisdiction of whatever rights she had under the Ohio act.

The following conclusion is taken from an article entitled "Workmen's Compensation Law and Conflict of Law". Minnesota Law Review for March, 1927, at page 329.

> "There is a contractual right in the state of hiring by virtue of the existence of its separate compensation act and the existence of a policy of insurance taken out and paid for by the employer; there

> is a separate right in the state of injury by virtue of a distinct and different act compulsory in its nature defining a status and the rights and obligations of both the employer and the employe."

In Farr v. Babcock Lumber & Land Co., 109 S. E. 833 (N. C.) the Tennessee compensation law was considered not to affect the rights and liabilities growing out of an injury sustained by an employe who was injured in the state of North Carolina although the contract of employment was made in Tennessee. The Supreme Court of North Carolina held that the Tennessee compensation act did not interfere with the jurisdiction of North Carolina where the injury occurred, to entertain actions for the employer's failure to keep a physician at the camp to attend the employe after he was injured or for its employment of an incompetent physician or for its negligent failure to provide the injured employe transportation to his home.

The reasoning in the above cases compels the conclusion that the state of injury may take jurisdiction of claims for compensation even though similar rights may exist in the state where the contract of employment was made and that upon the granting of such an award in the state of injury there would be no violation of any principles of law, reason, or public policy.

VI.

THE WIDOW'S CLAIM WAS DENIED BY THE SUPREME COURT OF TENNESSEE SOLELY BY REASON OF OHIO TAKING JURISDICTION.

The widow in this case, realizing the existence of a possible conflict of laws between the states of Tennessee and Ohio and in order not to be barred by reason of statutory regulations, filed a claim in the state of Tennessee in addition to that filed in the state of Ohio, both claims being based upon the injury which caused her husband's death.

Such a claim had to be filed in the state of Tennessee within one year from the date of injury or death. The claim for compensation filed with the Industrial Commission of Ohio was allowed in accordance with the provisions of Section 1465-74, General Code of Ohio, the provisions of which are quoted earlier in this brief. The claim, however, which was asserted in the state of Tennessee was denied by the Supreme Court of that state solely by reason of a special defense set up by the employer, the defendant herein, that Ohio has already taken jurisdiction of the widow's rights.

This case is deemed of sufficient importance in reflecting the scope and effect of the workmen's compensation act of Tennessee that we have printed in full opinion of the Supreme Court of Tennessee and made it a part of

this brief. (See Appendix A, Tidwell v. Chattanooga Boiler & Tank Company.)

The Tennessee court in the Tidwell case, supra, proceeded upon the theory that the claim of the widow in the state of Tennessee is an action ex-contractu and that the terms of the workmen's compensation act of Tennessee became part of the contract of employment. The court concluded that a right of waiver exists and that there was a renunciation of the contract of employment. Therefore, we have a definite recognition of Ohio's jurisdiction over the widow's claim by the highest court of Tennessee. That court in affirming the decision of the court below, which denied the rights of the widow, said in its opinion:

> "Not prejudging another case but merely by way of answer to arguments made in this case we may observe that the defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceedings and award to defeat its liability herein."

The above quotation is to be found at the very end of the opinion and plainly indicates that the defendant company successfully defended against the widow's claim in the state of Tennessee, basing its defense solely upon the fact that the state of Ohio has taken jurisdiction of this same claim. The syllabus of the above case is as follows:

> "Cora Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn., 420.
>
> 1. Workmen's compensation. Statutes. Compensation act is written into contract of employment.
>
> An action under the compensation act is an

action upon the contract of employment, into which all the terms of the compensation act are written by law.

2. Workmen's compensation. Contracts. Action in another state for compensation is renunciation of employment here.

Where a petition, having the right to proceed under our compensation act, instituted a proceeding and procured a recovery of compensation in the state in which an accident occurred, such action was a clear renunciation of the contract of employment made in this state, after which repudiation of the contract a proceeding cannot be maintained under our compensation act.

3. Election of remedies. Contracts. Party repudiating contract may not afterwards claim its benefits.

The obligations of a contract cannot be repudiated in one suit and benefits of that contract be claimed in a subsequent suit."

It would seem from the above that the defendant recognized the validity of Ohio jurisdiction since it successfully used that fact as a defense in the Tennessee courts. This amounts to an admission by the defendant that its liability for the death of William R. Tidwell was properly and legally before the Industrial Commission of Ohio for determination.

VII.

THE TENNESSEE ACT IS OPTIONAL OR ELECTIVE CREATING A CONTRACTUAL RELATIONSHIP BUT IS NOT EXCLUSIVE AS TO REMEDY IN PROCEEDING OUTSIDE OF THAT STATE.

The workmen's compensation act of Ohio has been sufficiently described by references to statutes and cases to indicate that it is a system of compensation based upon compulsory premium payments by every employer to maintain a state insurance fund controlled and operated by the state. By contrast, however, the Tennessee workmen's compensation act is optional or elective and subject to a contractual relationship where either party or both may agree to accept or reject the provisions of the act, and no general state fund exists.

The Supreme Court of Tennessee, in the case of Smith v. Van Noy Interstate Co., 262 S. W., 1048, discussed and defined the Tennessee act as being optional or elective and there are no compulsory features in the act insofar as the employer and employe are concerned. It further appears that where the parties accept the provisions of the Tennessee act, that awards for compensation and death benefits are paid either directly by the employer or by an insurance company which contracts with the employer to cover such risks.

In the case of Scott v. Bridge, 16 Thomp., 86, the Supreme Court of Tennessee stated:

> "Both the title and the body of the act expressly declare that the act is elective."

This essential difference between the Ohio and Tennessee acts materially affects the rights and remedies of the parties. For instance, the Iowa Supreme Court in Pierce v. Bekins Van & Storage Co., 172 N. W., 191, stated:

> "The fact that the statute is elective has controlling bearing on one thing that is highly important: namely, where the statute is elective as to both employer and employe, payment of compensation is not the performance of a statutory duty but the performance of the conditions in the contract of hiring, which conditions are in the contract by means of reading the compensation statute into the contract."

While the Tennessee act provides for exclusive remedies in enforcing violations of that act, such remedies are not exclusive when proceedings are brought by an employe outside of that state. In other words, the widow of William R. Tidwell in the claim filed in Tennessee was limited in her rights and remedies to those provided in the Tennessee act since the provisions of the Tennessee act are written in and become part of every contract of employment entered into in that state. However, it cannot be logically maintained that the widow could not avail herself of a different remedy when she brought separate proceedings in the state of the injury.

The Supreme Court of Tennessee in the Tidwell v.

Chattanooga Boiler and Tank Co. case, supra, seems to have concluded, in denying the rights of the widow in that state, that the rights and remedies provided in the Tennessee act are only applicable when such rights and remedies are sought in the courts of that state but that when proceedings are begun and rights adjudicated in the state of the injury, such proceedings amount to a disaffirmance and a waiver of all rights under the Tennessee law. This decision interprets the exclusive remedy statute found in the Tennessee act and is therefore controlling in the case at issue.

The conclusion is irresistible, therefore, that the Tennessee workmen's compensation law is only exclusive as to remedies that may be sought by the injured employe or his dependent in the state of Tennessee. This decision by the Supreme Court of Tennessee is consistent in that it affirms the jurisdictional power of Ohio to grant the award and to proceed against the employer as provided by the statutes of Ohio.

The Kansas compensation act apparently has an exclusive remedy provision which defines the remedies and the place where such remedies may be sought. In Harvis v. Cudahy Packing Company, 211 Mo. App., 188, it was held that there is no jurisdiction for suit outside of the state of contract where the workmen's compensation act has a provision that no action or proceeding provided for therein should be brought or maintained outside of the state of Kansas.

It is significant to note that the statute in the Tennessee act relating to remedies does not refer to actions

which may be brought outside of the state of contract, nor express any limitations thereto.

It would therefore seem, as was stated in American Radiator Co. v. Rogge, 86 N. J. L., 436, and Douthwright v. Champlin, 91 Conn., 524, that "if there is no contrary provision in the act, a workman may recover in a state in which he is injured under the workmen's compensation act of that state, although the employment was in another state."

Much consideration is given in this brief to the question whether the statutory provisions of the Tennessee act are exclusive as to remedies for the reason that it is a pivotal point in the following case: The Bradford Electric Lt. Co. v. Clapper, Admx., 286 U. S., 145, decided May 16, 1932, in which Mr. Justice Brandeis delivered the opinion of the court, Mr. Justice Stone wrote a concurring opinion, and Mr. Justice Cardozo took no part in the opinion or the decision of the case.

The facts in the Bradford case disclose that a contract of employment was entered into in the state of Vermont where the employer had its principal place of business and where the employe resided. The employe died of an injury which he sustained while engaged in his employers business in New Hampshire.

The Vermont compensation law has extra territorial application and contains statutory provisions as regards remedies. However, such provisions are exclusive and are strict limitations upon the rights of the injured employe or his dependents.

This court in holding that the employer's defense was

valid in a common law action in New Hampshire recognized that the employe and his dependents are bound by the exclusive remedy provision of the act which became part of the contract of employment. In other words, the decision of this court seems to be that there is no recovery in the state of injury in an action brought at common law if the act in the state of hiring provided definite and exclusive remedies for injuries sustained in the course of employment.

The Bradford case differs essentially from the instant case in the following respects:

1. In the Bradford case both the state of Vermont and the state of New Hampshire operated the elective or optional system of workmen's compensation, each recognizing a contractual relationship.

2. The court indicated that the New Hampshire law is only referable to residents of that state.

3. The employer in the Bradford case complied in both the state of hiring and in the state of injury.

4. In the Bradford case the dependent brought an action for damages at common law.

5. Under the workmen's compensation act of the state of Vermont, the employe and his dependents were bound by the exclusive remedy provisions of that law.

The instant case is distinguishable from the Bradford case in respect to every one of the above controlling facts. Indeed, Mr. Justice Brandeis recognized other elements which, if present in the Bradford case, would

have brought about a different decision. The very last words of the opinion are as follows:

> "We have no occasion to consider whether if the injured employe had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law."

To the above conclusion this honorable court could logically have added that, if the compensation act of the state where the injury occurred is compulsory or, if there was a waiver or disaffirmance of the contract of employment or, if the remedy statute in the state of hiring was not exclusive, then recovery would be permitted by this court in the state of injury.

Mr. Justice Stone in a short concurring opinion stated the position of the petitioner in the instant case and also indicated that if different or additional facts had existed in the Bradford case, a holding to the opposite effect would have been proper. Justice Stone states on page 164:

> "It is true that in this case the status of employer and employe, terminable at will, was created by Vermont laws operating upon them while they were within that state. I assume that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employe and given a locus in New Hampshire by their presence within the state, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employe there, which grow out of or affect the status in New Hampshire, must, by mandate of the Con-

stitution, be either defined or controlled, in the New Hampshire courts, by the laws of Vermont rather than of New Hampshire.

The interest, which New Hampshire has, in exercising that control derived from the presence of employer and employe within its borders, and the commission of the tortious act there, is at least as valid as that of Vermont, derived from the fact that the status is that of its citizens, and originated when they were in Vermont, before going to New Hampshire. I can find nothing in the history of the full faith and credit clause, or the decisions under it, which lends support to the view that it compels any state to subordinate its domestic policy, with respect to persons and their acts within its borders, to the laws of any other. On the contrary, I think it should be interpreted as leaving the courts of New Hampshire free, in the circumstances now presented, either to apply to refuse or refuse to apply the law of Vermont, in accordance with their own interpretation of New Hampshire policy and law."

It is therefore respectfully submitted that since the Supreme Court of Tennessee definitely decided in the Tidwell case, supra, that the Tennessee act is elective and the relationship is contractual, that the contract of employment may be waived or disaffirmed and that the remedy provided in the state of Tennessee related only to actions brought in that state, it follows that the remedy statute is not exclusive. The above conclusions, by the highest court of Tennessee distinguish and make the Bradford case not applicable.

VIII.

THE PETITIONER IS ENTITLED TO EQUITABLE CONTRIBUTION FROM THE DEFENDANT, THE AWARD HAVING BEEN PAID IN FULL OUT OF THE STATE INSURANCE FUND OF OHIO.

The decisions by the Supreme Court of Ohio, interpreting the provisions of Section 1465-74, make it a mandatory duty upon the Industrial Commission to pay to an injured employe or his dependents out of the state fund any award which has been adjudicated in favor of such employe or his dependents.

> "Payment from surplus fund ordered by mandamus where compensation was awarded widow of employe of noncomplying employer and where there was a judgment for the employer in an action by the attorney general to enforce the award. Compensation was not barred by widow's release to employer paying funeral expenses."
>
> State v. Indus. Com., 122 O. S., 509, 172 N. E. 364.

> "The last clause of G. C. Section 1465-74, requiring payment of an award against a noncomplying employer out of the surplus fund when the attorney general certifies that it cannot be collected from the employer, is clear, explicit and unambiguous; when such certification has been made, mandamus will lie to compel payment of the award. After such award has been made by the commission, the latter has no power, by virtue of its continuing jurisdiction under Section 1465-86, to vacate the award, unless there

was fraud or imposition practiced upon the commission in its procurement."

State v. Indus Com., 123 O. S., 164, 174 N. E. 345.

The above two cases hold that the award is payable out of the surplus fund regardless of the results to recoup the fund by a suit against the non-complying employer.

The award made in favor of the widow in this case, amounts to $4800.64 together with $110.00 as medical and funeral expenses. Under the Ohio act the widow receives 66-2/3 per cent. of the average weekly wage of her deceased husband, such weekly payments to continue for 416 weeks. The average weekly wage of the decedent was $17.31. The death benefits under the Tennessee act are provided for in Section 3608 a 181 (5), Tennessee Laws, and provide for 30 per cent. of the average weekly wage payable only during dependency and not exceeding a total of 400 weeks, which would make the maximum award $2076.00 plus $100.00 funeral expenses.

On the theory of an equitable contribution, it is respectfully urged that even if the state of Ohio exceeded her jurisdictional power in granting this award to the widow and since it is now paid in full, the defendant should therefore reimburse the petitioner to the extent of the amount the widow would have been entitled to receive under the provisions of the Tennessee act by reason of the death of her husband.

Any other conclusion would absolve the defendant from paying any part of an admitted liability and obli-

gation and leave the state of Ohio a total loser of nearly $5000.00. This principle of equitable contribution or equitable deduction in some instances has been definitely recognized by the courts of several states when dealing with a conflict under the provisions of the workmen's compensation act.

Thus, in Gilbert v. De Lauriers Column Mold Co., 180 App. Div. (N. Y.) 59, a claimant who was employed under a New York contract and was injured while performing services for his employer away from the plant of such an employer in the state of New Jersey, is under the protection of the New York statute rather than the New Jersey statute and the fact that the claimant was induced to invoke the New Jersey statute in the first instance, does not deprive him of his rights under the New York statute, and the insurance carrier is not aggrieved if credited with the amount it had paid under the provisions of the New Jersey act.

In the McLaughlins case, 274 Mass. 217, the amount of money received in New Hampshire by way of settlement between the insurer and the injured employe was applied as a credit in a subsequent award of compensation in the state of Massachusetts. The court said:

> "There is nothing in the statute which prevents the employer from recovering compensation here (Mass.) although he accepted money and gave the release (N. H.). The money received should be deducted from amount he is permitted to recover. But he retains the protection of the Massachusetts act, although he has given the release."

Now, then, if the state of Ohio had given effect to the death benefit provisions of the Tennessee act in determining the amount of the award, the defendant would have no cause to complain since the employer admits liability under the Tennessee law; furthermore, if the dependent had not filed her claim in Ohio, the Supreme Court of Tennessee would not have denied her claim and would have permitted the defendant to escape completely from paying any part of this claim.

Therefore, we respectfully urge this honorable court that since the state of Ohio paid to the widow of William R. Tidwell an obligation which should have been paid by the Chattanooga Boiler and Tank Company, in accordance with the principles of equity and good conscience the defendant should reimburse the state of Ohio in the amount which the employer would have been justly compelled to pay if Ohio had not taken jurisdiction of the widow's rights.

CONCLUSION.

The Industrial Commission of Ohio had the authority to hear and determine the claim of the widow and to make the award in her favor and against the employer, it having been shown to this honorable court that:

The state of Ohio under a valid exercise of the police power enacted a compulsory system of workmen's compensation under which a status is created for both the employer and the employe regardless of citizenship or legal residence.

Every employer of three or more persons who fails to pay his share of premiums into the state insurance fund becomes liable for any awards determined by the Industrial Commission in favor of such employe, injured workman or his dependents.

The defendant corporation, engaged in doing business in Ohio and employing eight persons at the time when William R. Tidwell, one of the employes, sustained a fatal injury in the course of his employment in Ohio, refused to comply with the Ohio workmen's compensation law.

The claim of the widow was denied by the courts of Tennessee. The Supreme Court of that state recognizing Ohio jurisdiction as a special defense, held the widow had a right to waive or disaffirm the terms of the contract of employment and that her remedies were not exclusively confined to the state of Tennessee.

The state of Ohio has paid to the widow a just obligation of the defendant and in equity and good conscience is entitled to judgment upon the award duly determined by the Industrial Commission of Ohio or for such an amount as the court deems fair and reasonable.

Respectfully submitted,

JOHN W. BRICKER,
Attorney General,
OSCAR A. BROWN,
Assistant Attorney General,
Counsel for Plaintiff.

PROOF OF SERVICE.

We hereby acknowledge receipt of copy of brief on behalf of plaintiff the state of Ohio, this tenth day of March, 1933.

HARRY B. ARNOLD,
Counsel for Defendant.
FRANCIS J. WRIGHT,
Of Counsel.

APPENDIX A.

163 Tennessee, 420.

Cora A. Tidwell v. Chattanooga Boiler & Tank Company.

Appeal from the Circuit Court of Hamilton county, Hon. L. D. Miller, J.

Lynch, Bachman, Phillips & Lynch, for plaintiff in error.

Rankin, Frazier & Roberts, for defendant in error.

Mr. Chief Justice Green delivered the opinion of the court.

This is a suit under chapter 123 of the Acts of 1919, by the widow of an employe of defendant. The suit was dismissed and the petitioner has appealed.

There is no question but that petitioner's husband met his death in an accident arising out of and in the course of his employment. The defendant's principal office is in Chattanooga, Tennessee, but it often sells its manufactured products in other states. Defendant had sold and agreed to install a boiler in Ironton, Ohio, and petitioner's husband, with other employes of defendant, was sent to this place in connection with the work of installation. The husband met his death in an accident occurring while on this job in the state of Ohio. His contract with defendant contemplated that he would be sent out of the state when occasion required, on jobs like this.

After her husband's death the petitioner herin began proceedings in Ohio against the defendant under the

workmen's compensation laws of that state, Sections 1465 et seq., of the General Code of Ohio. She obtained an award of $4800.64 from the Industrial Commission of Ohio on account of his death—$11.54 per week for 416 weeks. At the time of the trial below she had received from this source $1927.18 and it was stipulated herein that she would continue to receive said weekly payments until the award was satisfied.

The defendant received notice from the Industrial Commission of Ohio respecting the petitioner's claim there. Defendant ignored this notice, its position seeming to be that it had not qualified to do business in Ohio, had not complied with the compensation laws of that state, and was not amenable to said laws. After the award was made in favor of the petitioner the Ohio Industrial Commission called on the defendant to satisfy the same, which defendant has refused to do. The state of Ohio, however, has created an insurance fund and under its statutes the state acts as an insurer of the payment of compensation duly awarded, and the state, therefore, has made the payments to petitioner above mentioned and become responsible for payment of further installments of her compensation.

To recover its outlay and to secure its liability on this account, the state of Ohio appears to have brought one suit against the defendant for the use of this petitioner in the Federal District Court at Chatanooga. That court, however, held the petitioner was the real party plaintiff and there was no diversity of citizenship to sustain the jurisdiction.

In the present suit, the widow seeking the compensation which ordinarily she would be entitled to under the Tennessee statute, the sole defense interposed is the proceedings in Ohio. Such proceedings out of the way, there would be no defense on the record before us. We agree, however, with the trial judge that the defense made was good.

(1) The recovery here sought is a benefit the widow would be entitled to, if at all, as under the contract of employment between her husband and defendant. This is a suit upon contract. All the terms of chapter 123 of the acts of 1919 were written by law into that contract. Coal & Coke Co. v. Martin, 155 Tenn., 34; Leonard v. Cranberry Furnace Co., 150 Tenn., 346; Poore v. Bowlin, 150 Tenn., 412; Smith v. VanNoy Interstate Co., 150 Tenn., 25; Western Union Telegraph Co. v. Ausbrooks, 148 Tenn., 615.

(2) Section 19 of our compensation act is as follows:

> "That when an accident happens while the employe is elsewhere than in this state, which would entitle him or his dependents to compensation had it happened in this state, the employe or his dependents shall be entitled to compensation under this act if the contract of employment was made in this state, unless otherwise expressly provided by said contract."

Section 8 is in these words:

> "That the rights and remedies herein granted to an employe subject to this act on account of personal injury or death by accident shall exclude all other rights and remedies of such employe, his personal representative, dependents or next of kin, at com-

mon law or otherwise, on account of such injury or death."

Section 2 (b) contains this:

"Any reference herein to an employe who has been injured shall, when the employe is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable under this act."

See in this connection McCreary v. Nashville C. & St. L. Ry., 161 Tenn., 691.

The employment contract therefore, by force of Section 8 quoted, provided that the remedies thereby granted to this petitioner should exclude all her other rights and remedies, at common law or otherwise, on account of her husband's death. By force of Section 19 of the contract of employment covered this accident which occurred in the state of Ohio. See Smith v. VanNoy Interstate Co., supra. Accordingly, when petitioner instituted the proceedings in Ohio to recover compensation for her husband's death, this was a clear renunciation or disaffirmance of the contract.

(3) The obligations of the contract cannot be repudiated in one suit and benefits of that contract be claimed in a subsequent suit. O'Bryan v. Glenn, 91 Tenn., 106; Montlake Coal Co. v. Chattanooga Co., 137 Tenn., 440; Grizzard v. Fite, 137 Tenn., 103; and cases therein reviewed. There can be no question but that the election thus made was irrevocable because petitioner has taken the benefit of the Ohio suit and defendant will doubtless take the detriment of that suit.

Cases from other jurisdictions brought to our attention by counsel for petitioner are not apt. It does not appear that compensation statutes in those states contain provisions similar to Section 8 of our statute above set out and Section 14, and other provisions of our statute that might be mentioned.

It is argued that since the defendant has paid nothing on account of the Ohio award and is not admitting liability thereupon, it is in no position to raise this question of election or estoppel. Petitioner, however, has received the benefit of that award from defendant's insurer, the state of Ohio, and thus put her election beyond revocation under all authorities. She is not concerned with the controversy between defendant and its insurer.

Not prejudging another case, but merely by way of answer to argument made in this case, we may observe that defendant's way of escape from the Ohio proceedings and award is not apparent, after the pleading by the defendant of such proceedings and award to defeat its liability herein.

Affirmed.